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Federal Communications Commission
Office of Secretary

February 19, 2003

VIA HAND DELIVERY

Federal Communications Commission
Secretary's Office
Room TW-A325
445 12th Street SW
Washington, DC 20554

Re: MB Docket No. 02-230

Dear Sir or Madame:

Enclosed for filing are the Reply Comments of the International Association of Broadcast Monitors, along with four additional copies for the Secretary, the Bureau, and the Reference Information Center

It is our understanding that the Commission was closed on February 18, 2003 due to inclement weather. Therefore, this submission falls within the extended deadline set forth in the Order of the Commission dated January 2, 2003 (*See* 47 CFR § 1.4(j).)

Respectfully submitted,

Todd Murphy
Vice President
Universal Information Services, Inc.
1625 Farnam Street, Suite 550
Omaha, Nebraska 68102
(402) 342-3178

Pro Sherman
Senior Vice President
Video Monitoring Services of America
330 West 42nd Street
New York, NY 10036
(212) 736-2010

INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of

Digital Broadcast Copy Protection

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REPLY COMMENTS OF THE
INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS

Todd Murphy
Vice President
Universal Information Services, Inc.
1625 Farnam Street, Suite 550
Omaha, Nebraska 68102
(402) 342-3178

Pro Sherman
Senior Vice President
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330 West 42nd Street
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INTRODUCTION AND EXECUTIVE SUMMARY

The International Association of Broadcast Monitors (“IABM”) is pleased to offer the following comments in response to the Commission’s Notice of Proposed Rulemaking on digital broadcast copy protection, and in response to comments that were submitted by the Motion Picture Association of America, et al; Viacom; the National Broadcasting Company, Inc.; the Walt Disney Company and the ABC Television Network; the North American Broadcasters Association; the CBS Television Affiliates Association; and the NBC Television Affiliates Association. The IABM commends the Commission on the thoughtful questions that it has raised, and on its ongoing effort to accelerate the transition to digital broadcast television.

The IABM is a trade association that represents broadcast monitoring companies throughout the United States. Our members comprise the vast majority of companies and individuals in the United States who monitor broadcast news and public affairs programming, and then analyze and index those broadcasts for stories that reflect on the reputations and public perception of our clients. At present, most of our members select and compile this research on videotape or in a printed transcript, and then send the results to our clients through same-day or overnight delivery. However, changes in readily available technology and the increasing technical sophistication of our customers make it obvious that, eventually, the analog mode of delivery will become extinct. Even now, many of our customers clamor for the speed and convenience of digital delivery.

The research and analysis services that **we** provide help our clients keep track of what is being said about them on television or radio, regardless of where the broadcast occurred. We offer these services to a broad cross-section of the American public, including the White House

and Members of Congress; federal, state, and local government officials; corporations; law enforcement and public safety agencies; disaster relief agencies; advertising agencies and public relations firms; and, in some cities, private individuals. However, when we send the results of our research to our clients, we make it clear that the news segments that they receive are solely for their own internal use, and that they are not permitted to share those segments outside of the corporate family, organization, or agency.

The IABM generally supports the adoption and implementation of a digital broadcast flag. We realize that broadcasters and other creators of entertainment programming will not transmit their valuable programming in a digital format unless it is safe from piracy. In light of the recording industry's experience with Napster, this is a legitimate concern. However, the IABM is concerned that the Commission would apply the broadcast flag regulations to all television programs, regardless of whether or not they are likely to be copied and distributed on the internet. In our view, it is unlikely that broadcast news and public affairs programming, as opposed to entertainment programming, would be subject to the type of unauthorized commercial exploitation that the broadcast flag is intended to thwart. Therefore, the Commission does not have to include news programs within the scope of broadcast flag coverage in order to protect the commercial value of entertainment programming. We are also concerned that the broadcast flag would apply to all transmission and receiving equipment, regardless of whether or not it is likely to be used to facilitate piracy.

Last fall, the House Energy and Commerce Committee prepared a draft bill that directs the Commission to take certain steps to facilitate the transition to digital television. If the bill is reintroduced and becomes law, the Commission would have to ensure that any device that is

capable of processing a digital terrestrial broadcast signal would contain a broadcast flag that would prevent anyone from copying and redistributing television programs over the internet without authorization. However, the Committee made it clear that the broadcast flag should not be used to block public access to news and public affairs programs. The Committee also made it clear that the Commission should create a special exemption for companies that “produce, deliver, or retransmit digital terrestrial broadcast television programs to the public.” If the Commission decides to implement a broadcast flag, the IABM submits that the Commission should follow the Energy and Commerce Committee’s recommendations. In addition, the Commission should also make it clear that the professional equipment exemption would apply to equipment used by broadcast monitoring companies to extract segments of news programming for the public.

What is Broadcast News Monitoring?

Broadcast news programs have tremendous influence over public opinion. However, they are also very ephemeral. Once a news program is sent over the airwaves, it vanishes into the ether. Today, viewers can record these programs through the use of videocassette recorders. Even so, they don’t have the capacity to monitor and research each and every program that is broadcast in the United States each day. The broadcast monitoring industry meets the demand for tracking local and national news programs. Like newspaper clipping services, the members of our organization monitor national and local television, cable, and radio news programs all across the United States. We **seek** out and analyze news stories and segments from news programs that are of specific interest to each of our clients, we create an index of the information that they contain, and, in some cases, we deliver individual news segments to our customers

shortly after the initial broadcast. In most cases we deliver these segments on videotape, or we provide our clients with a printed transcript. In the future, we may be able to deliver these segments digitally to our clients through email or on a secure website.

In the *Sony Betamax* case, the Supreme Court held that off-air taping of entire programs for non-commercial time-shifting purposes is a legitimate fair use of broadcast programming, and, therefore, does not infringe the broadcasters' copyright in their programs. Broadcast monitors perform a similar, but far more useful and productive, service for our clients. We record, index, and analyze news programs for people who are unable to view the news when a broadcast occurs, because they do not have the technological ability to monitor and record each and every news program that comes on the air, or because they do not live in the geographic region where the broadcast occurs. In other words, broadcast monitors do for our clients what they have the right, but neither the time nor the resources, to do for themselves. However, broadcast monitors do not routinely reproduce copies of entire news programs, even though they might be permitted to do so under the *Sony* decision. Rather, they normally limit their distribution to discrete segments of news programming that contain only those stories or references that are of specific interest to their clients.

Broadcast monitoring services operate in 33 states and the District of Columbia. In major cities, such as New York, Chicago, Los Angeles, Atlanta, Houston, and Minneapolis, several broadcast monitors compete in the marketplace. The largest monitoring companies serve thousands of clients, and employ hundreds of people. In these same cities, as well as smaller ones, such as Albuquerque and Virginia Beach, other broadcast monitoring services are run out

of private homes by small owner-operators. Thus, the membership of our organization is very diverse.

Wherever they are located or whatever their size, broadcast monitors provide similar services. Clients normally place standing orders to monitor news and public affairs programs that might mention subjects of specific interest to the client, or might mention the client by name. Clients also use monitors to track commercial advertisements that appear during broadcast television programs to assist in the creative process when designing new advertisements. Our members also note the initial occurrence of new ads in order to keep their clients abreast of what their competitors are doing on the airwaves.

Broadcast monitors use VCRs and personal video recorders to record local and national news programs, just like a private individual who records programs for time-shifting purposes. However, the services that the broadcast monitors provide go beyond simple off-air recording. Our members carefully analyze each program for segments that correspond to the client's requests, and in most cases, we create a detailed index of how often each broadcaster covers a given subject. These logs identify the station that covered a particular issue, they provide a synopsis of the story or the interview, and they indicate the time and manner that the story was broadcast. The broadcast monitors typically provide their clients with a daily report of news stories aired concerning them, or other subjects of business interest. Then, if needed, we send our clients a selection of segments on audio or videotape or in a printed transcript.

Contrary to some misperceptions, the members of our organization do not monitor news broadcasts for resale or for rebroadcast. Instead, we provide research and analysis services that allow our clients to protect their vital interests--be it political, business, academic, or

professional. For example, the members of our organization do not rebroadcast the isolated news segments that we provide to our clients. Furthermore, all of our members make sure that our clients use their segments solely for their own internal research and analysis. The IABM Code of Ethics provides, in part, that:

- (1) Broadcast monitors shall record material as it is received without any alteration of the material as presented.
- (2) Broadcast monitors shall not knowingly assist anyone in violation of the copyright law or any other rights. Broadcast monitors shall provide to clients only those portions of broadcast reports which the client indicates he has a legitimate interest in obtaining. The clips so provided shall constitute discrete portions of the broadcast which are complete in themselves and shall identify the original broadcaster and the monitor providing the tape, and except for legends imposed thereon, shall be an accurate record of the material as broadcast.
- (3) Broadcast monitors shall place on each container a notice approved by the Association designed to prevent inappropriate or improper use of the material provided.

Broadcast News Monitoring Provides a Valuable Public Service

Broadcast monitoring services perform an important function in our society. They safeguard the public's right to access reports that bear directly or indirectly on the honor or reputation of important segments of the population, which would otherwise be unavailable to them. Since the advent of radio and television, broadcast news has been a chronicle of the times, recording not only events as they occur, but also shaping and reflecting how the public perceives and reacts to those events. Broadcast news programming **is** powerful, but it is evanescent. Although the images and influence of broadcast news programming are widely seen and felt, news programs are not readily available for public study and analysis.

There are many reasons why people analyze broadcast news programming. They include:

- public relations

- market research

- ensuring compliance with federal requirements that give political candidates the right to be aware of and react to statements made during a campaign

- providing a safeguard against, or to provide evidence in legal proceedings, such as defamation claims

Without broadcast monitoring services, none of these functions could be carried out easily or with much assurance of wide coverage. Broadcasters do not provide immediate, nationwide clipping services. In fact, some broadcasters refuse to provide segments of their programming, are unable to do so, or do so only when convenient. Even if they were to do so, the monitoring a broadcaster provides would be suspect, because broadcasters are not objective third parties. Broadcasters could make available only the segments they wish to make available. In instances where stations do provide segments of their newscasts to the public, *none*, to our knowledge, do so with the speed necessary to satisfy a company that needs to respond to the way that it has been portrayed by the news of the day. Indeed, frequently days or even weeks elapse before a station provides such segments. Further, many broadcasters will not provide all of their news coverage after the fact. Those who have taken to posting their news on their web sites, typically post only a fraction of what was broadcast over the air.

Obviously, our clients cannot watch all news broadcasts in all geographic viewing areas entirely on their own. In fact, the public generally has little, if any, advance warning of when and where a particular issue will be the subject of a news broadcast. For many corporations,

Members of Congress, government agencies, individuals, and even the President and Vice President of the United States, broadcast monitoring services are the only way of keeping track of news programming that affects them.

Who Uses Broadcast Monitoring Services?

The members of the IABM serve a broad range of clients and satisfy a great variety of needs. For example, various branches and agencies of the **United States Government** regularly use broadcast monitoring services, including the **White House**, the **FBI**, **CIA**, **IRS**, **FEMA**, **Center for Disease Control**, **Homeland Security**, and virtually every congressional office on Capitol Hill. Broadcast monitoring services help the federal government carry out many essential functions, from pursuing criminal investigations to coordinating disaster relief efforts. **Members of Congress** use monitoring services to keep abreast of national and local issues that are important to their constituents. More recently, NASA used broadcast monitoring during the Space Shuttle disaster to assure that the facts they provided to the media were accurately portrayed on the news.

Corporations rely on broadcast monitoring services to develop marketing strategies, to measure the effectiveness of their marketing efforts, and to obtain information on domestic and foreign competitors. They also use our services to manage crisis situations. For example, casualty insurance companies used broadcast monitors to respond to needs arising from Hurricane Hugo, the San Francisco earthquake in 1989, and just this week, the Blizzard of 2003. Corporations also use broadcast monitors to coordinate their efforts to recall defective products or tainted food. Further, our industry has been told that if the SEC adopts rules that would

require brokerage firms to keep transcripts of what their analysts say on the air, broadcast monitors would be the only likely source for such transcripts.

Charitable organizations, such as the American Cancer Society, the United Way, UNICEF, and the American Red Cross, use broadcast monitoring services to evaluate the scope and nature of community needs, and to follow local coverage of their fundraising events.

At the state and local level, broadcast monitoring services are regularly used by **government agencies, school boards, hospitals and police departments**.

National and local **elected officials** and **political candidates** use broadcast monitoring services to assess public opinion, to ensure that they are complying with FCC and FEC regulations, and to keep themselves informed about issues and current events of interest to the constituents in their communities and to the public at large.

Educational institutions are one of the most important consumers of broadcast monitoring services. Colleges and universities are anxious to measure the public perception of their success or failure in providing quality education, and broadcast monitoring services are invaluable in giving them vital feedback.

Lawyers use broadcast monitoring services to gauge the tone and level of local coverage of their clients' cases to determine if they will receive a fair trial in a particular location.

Public relations agencies use broadcast monitoring services to evaluate their efforts to bring their clients to the public's attention and to refine their client's needs.

Advertising agencies use broadcast monitoring services to identify market trends, to see their advertisements used in context, and to assist in the creative process when designing new advertisements.

Individuals rely on broadcast monitoring services for access to news programming either about them or about subjects that are of direct importance to them. Of all our clients, individual citizens are the least able to monitor news and public affairs programming on their own, and, thus, are heavily reliant on broadcast monitors to do so on their behalf.

The Commission Should Create an Exemption for News and Public Affairs
Programming, and for the Broadcast Monitoring Companies Who Make the News that
They Contain Available to the Public

Broadcast monitoring services play an integral role in the dissemination of news and other public information. Recognizing this fact, many national and local broadcasters have excellent working relations with the broadcast monitoring services that serve their communities. Indeed, many refer viewers' requests for program segments of recent broadcasts to members of the IABM, in part, because they don't have the workforce to provide that service on their own. They are in the broadcast business, not the clipping business. In this way, broadcasters and broadcast monitoring services together ensure that the public's need for access to news and information is satisfied.

The IABM is concerned that the broadcast flag could prevent our members from providing the important public service that our clients have come to expect. Therefore, we urge the Commission to exempt news or public affairs programming from the scope of the broadcast flag. Likewise, if the Commission creates a "professional equipment" exemption for companies that produce, deliver, or retransmit digital broadcast television programs to the public, we urge the Commission to include the broadcast news monitoring industry within the scope of that exemption.

We believe that these exemptions are appropriate, because broadcast news monitoring does not have an adverse economic impact on broadcast news programming, or on the broadcasters' incentive to produce the news. It does not compete with the real-time delivery of over-the-air news. **As** mentioned above, producing news programming and providing news monitoring services are not the same business. Commercial broadcasters generate revenues from the news by producing programs that attract viewers, that increase audience shares, and that allow them to sell advertising at rates that escalate with the size of the audience. Broadcast monitoring services, by definition, have no impact on the size of the broadcasters' audience. In fact, most of their clients are incapable of tuning in to the original programming because of simple geography. Furthermore, broadcast monitors do not sell advertising time, because they do not rebroadcast the news segments that they record and excerpt for their clients. Because broadcast monitoring services do not compete with broadcast stations for audiences or for advertising revenues, they have no actual or potential negative impact on the market for, or the value of, the advertising time sold by broadcast stations.

For example, if a broadcast monitoring service in Texas makes a compilation of news segments from a local broadcast and sends that compilation to a client in New York, the Texas news station has not been affected in any way. The monitoring service did not cut into the size of the Texas station's audience, and did not siphon revenues that would otherwise have gone to the broadcaster. In fact, the Texas news station may benefit from the increased exposure to potential advertisers who are geographically distant and temporarily removed from the time and place of the initial broadcast.

Moreover, broadcasters are not, and have no demonstrable interest in, exploiting the market for broadcast monitoring services. They do not promote the sale of segments of their programs in their local markets, let alone nationally. They generally see it as an unprofitable bother. They maintain no standing orders from clients for analysis of the news, nor do they research news programs that are made by other broadcasting companies. Thus, broadcast monitoring services have no impact on any potential market that the broadcasters may seek to enter in the digital age

The nature of news and public affairs programs also argues in favor of creating an exemption for news programming and broadcast monitoring services. Unlike entertainment programs, news programs lose most of their value as soon as they are broadcast. The value of news programs lies in their up-to-the-minute timeliness. Thus, there is no significant aftermarket for news programs, and there is certainly no commercial market for syndicated news programs. Simply put, news programs are ephemeral. They become inaccessible to the public as soon as they are broadcast. Congress has made it clear that the relative inaccessibility of a work should be considered as a factor in assessing whether the reproduction of that work should qualify as a “fair use” under the copyright laws. As the Senate Judiciary Committee observed,

A key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential user. If the work is “out of print” and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, but the existence of organizations licensed to provide photocopies of out-of-print works at a reasonable cost is a factor to be considered.

S. Rep. No. 473, 94th Cong., 2d Sess., at 64 (1976). This is precisely the type of service that the broadcast monitors provide. Given the fact that this service may qualify as a fair use under the

copyright laws, it would be inappropriate for the Commission to mandate a technical measure that would effectively prevent the broadcast monitors from engaging in that type of use

The amount of material that the broadcast monitors provide to their clients also argues in favor of creating an exemption for this type of research and analysis service. Broadcast monitors monitor news and public affairs programs in order to compile brief segments from various informational broadcasts. Except in highly unusual circumstances, we do not send our clients entire news broadcasts--or excerpt substantial parts of news broadcasts. The fact of the matter is that our clients are not interested in paying us to compile portions of news programs that don't concern them. One of the most valuable services that we provide is that we screen out irrelevant information, and compile only what is directly related to our client's interests.

Creating an exemption for broadcast monitoring would also be in the public interest. As discussed above, many clients use broadcast monitoring services to keep track of what is being said about them in the broadcast press, and to help them respond to these news reports. Congress has made it clear that this is precisely the type of activity that should also qualify as a fair use under the copyright laws. As the legislative history of § 107 explains,

When a copyrighted work contains unfair, inaccurate or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment in the statements made in the work.

H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 73 (1976). Broadcast monitors provide the means for conducting this type "monitoring" or "fact-checking" activity on a nationwide basis. In other words, broadcast monitoring is a type of activity as a subset of the news reporting exception of

§ 107 that Congress had in mind when it incorporated the fair use doctrine into the copyright law. Therefore, if the FCC decides to implement the broadcast flag, we submit that the Commission should respect that decision and incorporate it into its regulatory framework.

Respectfully submitted,

Todd Murphy
Vice President
Universal Information Services, Inc.
1625 Farnam Street, Suite 550
Omaha, Nebraska 68102
(402) 342-3178

Pro Sherman
Senior Vice President
Video Monitoring Services of America
330 West 42nd Street
New York, NY 10036
(212) 736-2010

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